84-1603

No.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

WILLIE KELTEE - - - - - Petitioner

versus

COMMONWEALTH OF KENTUCKY - Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

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QUESTION PRESENTED

Where "accident" provides a complete defense to a criminal charge, and substantial evidence of accident is presented, does a court's refusal to instruct on a defendant's theory of "accident," as requested, constitute a violation of fundamental due process and reversible error?

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IN THE

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October Term, 1984

No. _____

WILLIE KELTEE - - - - - *Petitioner*

v.

COMMONWEALTH OF KENTUCKY - - *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

OPINION BELOW

The opinion of the Supreme Court of Kentucky was rendered February 28, 1985. This opinion was designated "Not to be published" and is, therefore, not reported. This opinion is reproduced in the Appendix, *infra*. Pursuant to the Kentucky Rules of Civil Procedure governing appeals, "an opinion of the Supreme Court becomes final on the 21st day after the date of its rendition" [CR 76.30(2)(a)], and "no mandate shall be required to effectuate the final decision of an appellate court" [CR 76.30(2)(f)].

JURISDICTION

The opinion of the Supreme Court of Kentucky became final on March 21, 1985, by operation of Kentucky Rule of Civil Procedure 76.30(2)(a)(f). This Court has jurisdiction under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the United States Constitution provides in pertinent part: "... nor shall any State deprive any person of life, liberty, or property, without due process of law. ..."

STATEMENT OF THE CASE

A. The Indictment, Evidence and Instructions at Trial

The defendant-petitioner Willie Keltee was charged with the offense of murder by causing the death of his wife by shooting her with a shotgun. At trial, the defendant's sole defense was that the homicide was accidental. Keltee tendered an instruction as to this defense of accident which the trial court refused to give. The tendered instruction was as follows:

Accident

> If the jury believes that at the time of the shooting in this case, the defendant did not act intentionally, wantonly, or recklessly to harm the deceased, but that the shooting occurred accidentally, then the jury shall find the defendant not guilty as charged.

This instruction was supported by substantial evidence at trial. For instance, Keltee testified that the shooting was accidental.

> Q. Willie, did you intend to pull that trigger and kill your wife?
>
> A. No, sir, I didn't. I didn't in no way intend to hurt my wife. I love my wife.

Q. When you say you had that gun, you had already ejected the round that you thought was the only round in there.

A. Yes, sir.

. . .

Q. All right. Is your shooting your wife an accident?

A. Yes, sir. I wasn't never intentionally trying to hurt my wife. [T.E. 206-207.]

Keltee explained that he thought the gun was unloaded because he had ejected the only shell. [T.E. 198.]

However, petitioner's jury was presented with the indictment charging murder and also six (6) separate substantive crime instructions on intentional murder, wanton murder, first degree manslaughter (death), first degree manslaughter (serious physical injury), second degree manslaughter, and reckless homicide. [Please refer to entire instructions reproduced in Appendix B, *infra*.] In contrast to the indictment and these instructions, there was *not one word* presenting the defense theory of accident to the jury.

B. The Verdict and Sentence

Petitioner was tried before a jury and was convicted of wanton murder on June 20, 1984. On July 11, 1984, petitioner was sentenced to serve "20 years on the charge of murder."

C. The Proceedings in the Supreme Court of Kentucky

On appeal, petitioner raised as a ground of error the trial court's refusal to give the proposed jury in-

struction presenting the petitioner's sole defense of accidental shooting. In addressing this ground, the Supreme Court of Kentucky held that the trial court correctly refused to instruct the jury on "accident," reasoning that "it is not necessary to instruct the jury on the defense's theory of accident because the jury must necessarily negate that defense in order to find the defendant guilty beyond a reasonable doubt of all of the elements of any crime charged in the instructions." The Kentucky Court concluded that, "The defendant wins when the other side fails to persuade the jury." [Please refer to opinion reproduced in Appendix A, *infra.*]

REASONS FOR GRANTING THE WRIT

The Affirmance of the Trial Court's Refusal to Instruct the Jury Upon Request As to the Defendant-Petitioner's Sole Defense of Accident, Denied the Petitioner Due Process of Law as Guaranteed by the Fourteenth Amendment *and* Creates a Direct Conflict Between State Courts of Last Resort on an Important Constitutional Due Process Question.

The refusal of the trial court to give the "Accident" instruction requested by the petitioner was fundamental error denying due process and is recognized as such by many state courts of last resort, including Delaware, Georgia, Massachusetts, Michigan, Missouri, New Hampshire, North Carolina, Ohio, Texas, Virginia, and West Virginia.[1] For example, in *Martin* v.

[1]For instance, see: *Ward* v. *State*, Del. Supr., 366 A. 2d 1194, 1196-1197 (1976); *Taylor* v. *State*, Ga. App., 297 S. E. 2d 755, 757 (1982); *Commonwealth* v. *Lowe*, Mass. App. 444 N. E. 2d 1314, 1316

(Footnote continued on following page)

Commonwealth, Va., 235 S. E. 2d 304 (1977), the Supreme Court of Virginia explicitly held that, "where the evidence warrants, an accused is entitled to an instruction presenting his theory of accidental killing as a defense." *Id.*, p. 305. In so holding, the Virginia Court stated its fundamental reasoning:

> In none of the instructions granted by the trial court, however, was the jury told that the burden was upon the Commonwealth to prove the killing was not accidental and that the jury should acquit the defendant if it entertained a reasonable doubt whether the death was accidental or intentional. It was error to refuse an instruction embodying these propositions. And, although the jury may have rejected the theory of accidental killing by finding the defendant guilty of murder, because this finding may have resulted from the mistaken belief that the burden was upon the defendant to prove the killing was accidental, the error was prejudicial. *Id.*

The quoted reasoning presents a perfect contrast to the holding of the Kentucky Court in petitioner's case. The Virginia Court's reasoning demonstrates the fundamental due process violation in failing to give a

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(1983); *People* v. *Newman*, Mich. App., 309 N. W. 2d 657, 657 (1981); *State* v. *Stubenrouch*, Mo. App., 591 S. W. 2d 42, 45 (1979); *State* v. *Aubert*, N. H., 421 A. 2d 124, 126 (1980); *Martin* v. *North Carolina*, N. C., 240 S. E. 2d 486, 487 (1978); *City of Columbus* v. *Bee*, Ohio App., 425 N. E. 2d 409, 413 (1979); *Garcia* v. *State*, Tex. Cr. App., 605 S. W. 2d 565, 566 (1980); *Martin* v. *Commonwealth*, Va., 235 S. E. 2d 304, 305 (1977); and *State* v. *Evans*, W. Va., 310 S. E. 2d 877, 882 (1983).

criminal defendant's instruction on accident when requested.

The fact is that the accident instruction needs to be presented to the jury to focus the jury's attention on the defense's central issue. The fact is that it is of little value to permit a defendant to offer a defense if the jury is not informed that the defense, if it is believed or if it helps create a reasonable doubt in the jury's mind, will entitle the defendant to a judgment of acquittal.

The Kentucky Court's conclusion that, "The defendant wins when the other sides fails to persuade the jury," approves a procedure allowing all the cards in the deck to be stacked against the defendant. By its holding below, the Ketnucky Court has ruled that it is permissible to submit the prosecution's theory to the jury but that it is not permissible to submit the defendant's theory to the jury. Such a ruling violates due process.

The denial of due process of law guaranteed to a state defendant by the Fourteenth Amendment, which occurred below, and the direct conflict of the decision below with the decisions of numerous other state courts of last resort, demonstrate the presence of an extremely important question of law calling for review and resolution by the Supreme Court of the United States.

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

RENDERED: FEBRUARY 23, 1985
NOT TO BE PUBLISHED

SUPREME COURT OF KENTUCKY

84-SC-894-MR

WILLIE KELTEE - - - - - - - *Appellant*

v.

COMMONWEALTH OF KENTUCKY - - - *Appellee*

Appeal From Jefferson Circuit Court
Hon. John W. Potter, Judge
(Indictment No. 83-CR-0163)

MEMORANDUM OPINION OF THE COURT AFFIRMING

Willie Keltee was convicted of the wanton murder of his wife in Jefferson Circuit Court per KRS 507.020(1)(b). Keltee was sentenced to a term of twenty (20) years on his conviction.

On appeal Keltee raises four allegations of error: (1) that there was insufficient evidence to support the instruction for wanton murder and accordingly the conviction must be reversed; (2) that the jury should have been instructed on "accident," the defendant's theory of the case; (3) that a statement by Keltee made 30 days prior to the killing in which he said he "ought to kill" his wife, should have been excluded; and (4) that two photographs admitted into evidence were inflammatory and not necessary to establish any facts not sufficiently proven by other evidence. For reasons that follow, we affirm.

Keltee contends the prosecution argued that the evidence showed an intentional killing to the exclusion of wanton murder. Indeed, the prosecutor merely referred to wanton murder in passing. However, how the Commonwealth argued the case is not determinative. Keltee admitted pointing the shotgun in the direction of his wife during an argument intending to scare her, though claiming he had no intention to shoot her. The gun fired, killing Mrs. Keltee. Pointing a dangerous weapon at a person is an excellent example of wanton conduct. We agree with the appellee's observation that there was evidence to support intentional, wanton, reckless or accidental killing, whichever the jury should decide. There was sufficient evidence for the wanton murder instruction and the jury's conclusion under it. From the evidence as a whole a reasonable juror could believe that appellant fired the gun in the direction of his wife, but without consciously intending her death.

In his argument for an instruction on "accident" Keltee asks this Court to reconsider its position in *Hendricks* v. *Commonwealth,* Ky., 550 S. W. 2d 551 (1977), where we held that it is not necessary to instruct the jury on the defense's theory of accident because the jury must necessarily negate that defense in order to find the defendant guilty beyond a reasonable doubt of all of the elements of any crime charged in the instructions. We do not believe that this reasoning is fallacy, but find it is appropriate.

Our position regarding instructions for an "accident" defense is consistent with our decisions not to require a "good faith" instruction, an "alibi" instruction or an "eyewitness" instruction. *Stafford* v. *Commonwealth,* Ky., 490 S. W. 2d 738 (1973) (good faith); *Fible* v. *Commonwealth,* Ky., 461 S. W. 2d 553 (1970) (alibi); *Brock* v. *Commonwealth,* Ky. App., 627 S. W. 2d 42 (1981), cert. den., 456 U. S. 1009 (1982) (eyewitness).

All the above are evidentiary instructions. They are similar to an "unavoidable accident" instruction in civil cases, where we have also eliminated such use. *Wooten* v. *Legate,* Ky., 519 S. W. 2d 385 (1974). The problem with these evidentiary instructions is that they overemphasize an aspect of the evidence. *Wooten, supra* at 386. The *Hendricks* approach is better because the instructions then direct the jury to the elements that must be proved by the party who has the burden of proof. The defendant's evidence merely negates what the Commonwealth is trying to prove. The defendant wins when the other side fails to persuade the jury. This is so if the jury believes the defense's theory, or some other theory, or whether the jury is simply unconvinced by the Commonwealth's proof.

> "No matter what technical defense is asserted by an accused at trial, the jury is always free to disbelieve such evidence as relates to this defense and to believe instead any remaining evidence from which an exoneration of the crime might be inferred." *Pace* v. *Commonwealth,* Ky., 561 S. W. 2d 664, 667 (1978).

Keltee's third argument challenges a statement admitted into evidence. Thirty days before the crime Keltee had said he "ought to kill" his wife. He contends that this statement is "a single and unrepeated, remote, and nonserious statement which did not indicate a settled hatred or condition of mind, [and was] of minimal probative value." All these criticisms of the statement run to its credibility and accordingly, were brought out to the jury. We have held admissible just such an "ought to" statement, saying it was not too remote when made three to four weeks before a killing. *Terrence* v. *Commonwealth,* 265 S. W. 2d 40 (1954), cert. den., 348 U. S. 899 (1954).

The final challenge made by Keltee is that two photographs admitted into evidence were inflammatory and un-

necessary, since the other evidence substantiated any fact the photos could prove. This jurisdiction has determined that as a general rule all photographs of the scene of a crime are admissible, and will not be excluded just because the pictures are gruesome. *Taylor* v. *Commonwealth,* Ky., 564 S. W. 2d 9, 10 (1978). Furthermore, we have determined that it is an "inherent power" of the trial court to determine how much evidence will be allowed on a certain point of fact. *Id.* We see no abuse of this power in the admission of these photographs, but do recognize that in "extreme circumstances" such photographs can be excluded as unnecessary and inflammatory. *Frick* v. *Commonwealth,* 313 Ky. 163, 230 S. W. 2d 634 (1950); see Lawson, *Kentucky Evidence Law Handbook* § 12.05(B) (2nd ed. 1984). This it not such an extremely prejudicial situation.

For the foregoing reasons the judgment of the Jefferson Circuit Court is affirmed.

All concur.

APPENDIX B

JEFFERSON CIRCUIT COURT

SEVENTH DIVISION

No. 83CR0163

COMMONWEALTH OF KENTUCKY - - - *Plaintiff*

v.

WILLIAM H. KELTEE
A.K.A. WILLIE KELTEE - - - - *Defendant*

INSTRUCTIONS

Under the evidence presented to you in this case, you may find the defendant, William H. Keltee, not guilty or you may find him guilty of one of the following offenses:

(a) Murder, as set out in Instruction No. 1;

OR

(b) Murder, as set out in Instruction No. 2;

OR

(c) First-Degree Manslaughter, as set out in Instruction No. 3;

OR

(d) First-Degree Manslaughter, as set out in Instruction No. 4;

OR

(e) Second-Degree Manslaughter, as set out in Instruction No. 5;

OR

(f) Reckless Homicide, as set out in Instruction No. 6.

NO. 1 — MURDER

You will find the defendant, William H. Keltee, guilty under this instruction if, and only if, you believe from the evidence beyond a reasonable doubt all of the following:

(a) That in this county on or about November 14, 1982, he killed Carolyn J. Keltee by shooting her with a shotgun;

(b) That in so doing he caused Carolyn J. Keltee's death intentionally;

AND

(c) That in so doing he was not acting under the influence of extreme emotional disturbance for which there was a reasonable justification or excuse under the circumstances as he believed them to be.

If you find the defendant guilty under this instruction, you will fix his punishment at confinement in the penitentiary for not less than twenty (20) years or at life, in your discretion.

NO. 2 — MURDER

If you do not find the defendant, William H. Keltee, guilty under Instruction No. 1, you will find him guilty under this instruction if, and only if, you believe from the evidence beyond a reasonable doubt all of the following:

(a) That in this county on or about November 14, 1982, he killed Carolyn J. Keltee by shooting her with a shotgun;

AND

(b) That in so doing he was wantonly engaging in conduct which created a grave risk of death to another and thereby caused Carolyn J. Keltee's death under circumstances manifesting an extreme indifference to human life.

If you find the defendant guilty under this instruction, you will fix his punishment at confinement in the penitentiary for not less than twenty (20) years or at life, in your discretion.

NO. 3 — FIRST-DEGREE MANSLAUGHTER

If you do not find the defendant, William H. Keltee, guilty under Instructions No. 1 or No. 2, you will find him guilty under this instruction if, and only if, you believe from the evidence beyond a reasonable doubt all of the following:

(a) That in this county on or about November 14, 1982, he killed Carolyn J. Keltee by shooting her with a shotgun;

AND

(b) That in so doing he intended to cause Carolyn J. Keltee's death.

If you find the defendant guilty under this instruction, you will fix his punishment at confinement in the penitentiary for not less than ten (10) years nor more than twenty (20) years, in your discretion.

NO. 4 — FIRST DEGREE MANSLAUGHTER

If you do not find the defendant, William H. Keltee, guilty under Instructions No. 1, No. 2 or No. 3, you will find him guilty under this instruction if, and only if, you believe from the evidence beyond a reasonable doubt all of the following:

(a) That in this county on or about November 14, 1982, he killed Carolyn J. Keltee by shooting her with a shotgun;

AND

(b) That in so doing he was acting with the intention of causing serious physical injury to Carolyn J. Keltee.

If you find the defendant guilty under this instruction, you will fix his punishment at confinement in the penitentiary for not less than ten (10) years nor more than twenty (20) years, in your discretion.

NO. 5 — SECOND-DEGREE MANSLAUGHTER

If you do not find the defendant, William H. Keltee, guilty under Instructions No. 1, No. 2, No. 3 or No. 4, you will find him guilty under this instruction if, and only if, you believe from the evidence beyond a reasonable doubt all of the following:

(a) That in this county on or about November 14, 1982, he killed Carolyn J. Keltee by shooting her with a shotgun;

AND

(b) That in so doing he was acting wantonly.

If you find the defendant guilty under this instruction, you will fix his punishment at confinement in the penitentiary for not less than five (5) years nor more than ten (10) years, in your discretion.

NO. 6 — RECKLESS HOMICIDE

If you do not find the defendant, William H. Keltee, guilty under Instructions No. 1, No. 2, No. 3, No. 4, or No. 5, you will find him guilty under this instruction if, and only if, you believe from the evidence beyond a reasonable doubt all of the following:

(a) That in this county on or about November 14, 1982, he killed Carolyn J. Keltee by shooting her with a shotgun;

AND

(b) That in so doing he was acting recklessly.

If you find the defendant guilty under this instruction, you will fix his punishment at confinement in the peni-

tentiary for not less than one (1) year nor more than five (5) years, in your discretion.

NO. 7 — DEFINITIONS

(a) "Intentionally"—A defendant acts intentionally with respect to another's death or to his serious physical injury when it is his conscious objective to cause that death or that injury.

(b) "Wantonly"—A defendant acts wantonly with respect to another's death when he is aware of and consciously disregards a substantial and unjustifiable risk that death will occur. In order to be "substantial and unjustifiable" the risk of death must be of such nature and degree that disregard thereof constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation.

(c) "Recklessly"—A defendant acts recklessly with respect to another's death when he fails to perceive a substantial and unjustifiable risk that death will occur. In order to be "substantial and unjustifiable" the risk of death must be of such nature and degree that failure to perceive it constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation.

(d) "Serious Physical Injury"—Means physical injury which creates a substantial risk of death, or which causes serious and prolonged disfigurement, prolonged impairment of health, or prolonged loss or impairment of the function of any bodily organ.

NO. 8 — The law presumes a defendant to be innocent of a crime, and the indictment shall not be considered as evidence or as having any weight against him. You shall find the defendant not guilty unless you are satisfied from the evidence alone, and beyond a reasonable doubt, that he is guilty. If upon the whole case you have a reasonable doubt that he is guilty, you shall find him not guilty.

If you find him guilty but have a reasonable doubt as to the degree of the offense of which he is guilty, you shall find him guilty of the lower degree.

Murder is the highest degree; First-Degree Manslaughter is the next highest degree; Second-Degree Manslaughter is the next to the lowest degree; and Reckless Homicide is the lowest degree.

NO. 9 — The verdict of the Jury must be unanimous as to guilt or innocence, and if guilty, must be unanimous as to the punishment, and be signed by one of you as Foreperson. You may use the forms provided at the end of these instructions in writing your verdict.

_____

John W. Potter, Judge

Date: _____